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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1896

RICHARD LEE HENDRIX,
(T/N ROBERT LEE HENDRIX),

Petitioner,

vs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

Respondent,

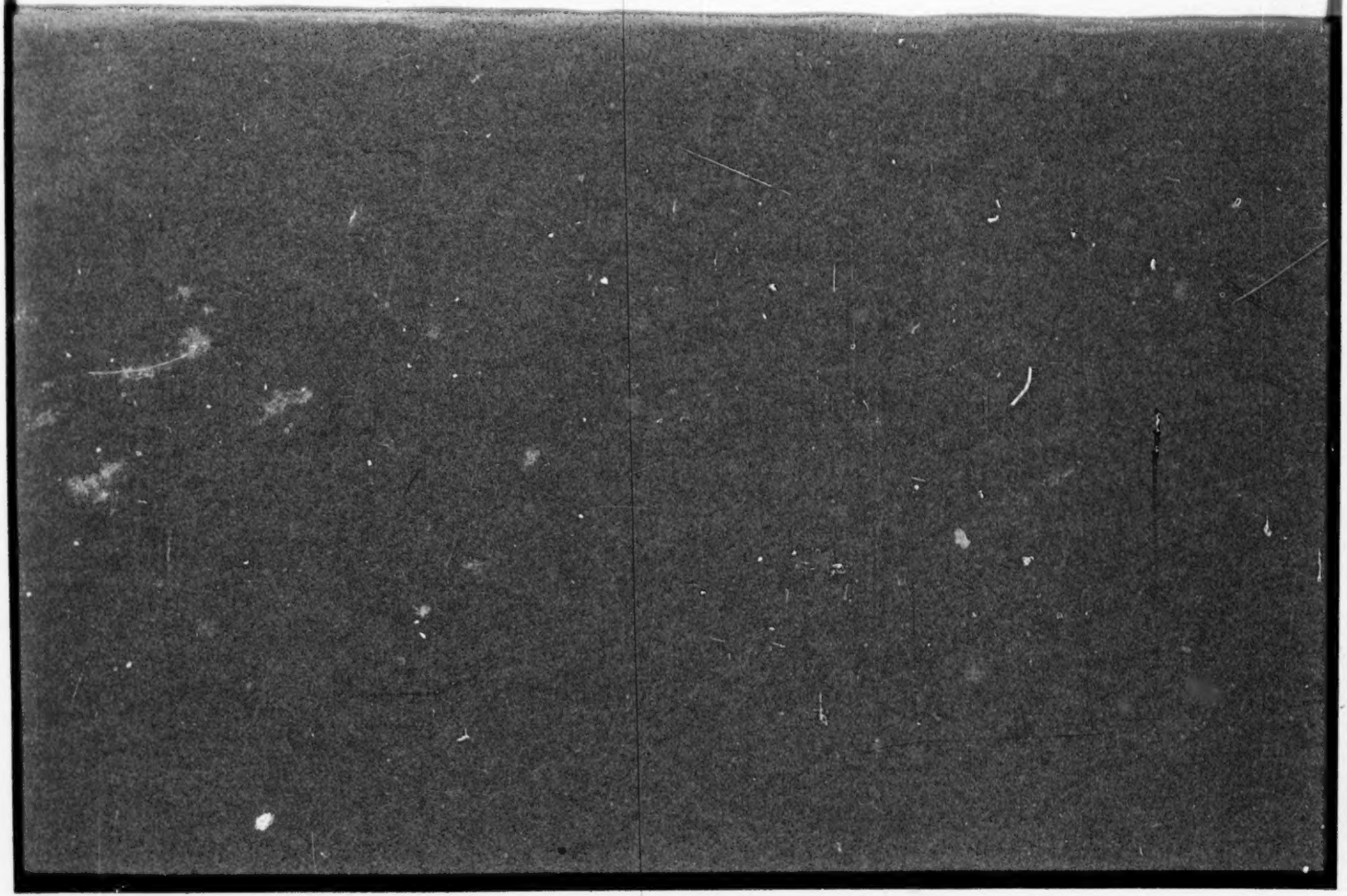
UNITED STATES OF AMERICA,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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Attorney for Petitioner



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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner, ROBERT LEE HENDRIX, respectfully petitions this Honorable Court for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on May 20, 1974,

refusing to make the rule against vehicle searches by federal officers without probable cause applicable to petitioner.

OPINIONS BELOW

To Petitioner's knowledge, neither the original order of the United States Court of Appeals for the Ninth Circuit nor the order denying the Petition for Rehearing have been officially reported as yet. A copy of the original order is attached hereto as Appendix "A" and a copy of the order denying the Petition for Rehearing is attached hereto as Appendix "B".

JURISDICTION

This Court has jurisdiction to review this case under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the United States Court of Appeals for the Ninth Circuit be ordered to apply their own rule of law, as stated in United States v. Bowen, ___ F.2d ___ (9th Cir. 1974) based on the constitutional

principles which this Honorable Court stated in United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2533 (1973), to Petitioner when Almeida-Sanchez, supra, reaffirmed the basic constitutional principle that searches require probable cause, did not make new law, and when petitioner was arrested subsequent to the arrest of Almeida-Sanchez. Since Bowen has not been officially reported, a copy of the decision is attached hereto as Appendix "C".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV - United States Constitution;
Title 8, U.S.C. §1357(a) and (c);
8 C.F.R. §287.1(a)(2)
See Appendix "D"

STATEMENT OF FACTS

Petitioner was charged in a one-count indictment with a violation of Title 21, U.S.C. §841(a)(1) charging possession with intent to distribute a controlled substance, namely marijuana. He was arrested on March 17, 1972 at the U.S. Border Patrol

Checkpoint on Highway 86, 17 miles north of Westmoreland, California and approximately 45 miles from the international border between Mexico and the United States.

Petitioner, a Negro, then 21 years of age, was the sole occupant of a 1962 Buick automobile bearing California plates. According to the Border Patrolman, the vehicle appeared to be riding low in the rear. There was no indication that Petitioner or the vehicle had come from Mexico or had crossed any border at any time. The back seat of the vehicle was ordered removed without a search warrant or consent of Petitioner and the contraband was found therein. At no time did the Government contend that this was the equivalent of a border search.

On May 15, 1972, the trial court denied Petitioner's Motion to Suppress the Evidence. Said motion was submitted on the facts as stated in Petitioner's Motion and the Government's response. A copy of both the aforesaid sets of facts are attached as Appendix "E". It was further stipulated that the arrest was within 100 miles of the border.

On November 9, 1972, he was found guilty as charged by a jury.

Upon appeal to the United States Court of Appeals for the Ninth Circuit, the case was set for oral argument on June 13, 1973. On that date, counsel for Petitioner appeared but oral argument was not taken as the Court ordered the matter taken under submission pending the outcome of Almeida-Sanchez, supra. A copy of said order is attached as Appendix "F". Upon affirmation of the conviction, on July 9, 1973, see Appendix "A", a Petition for Rehearing was filed on July 19, 1973, and subsequently denied on May 20, 1974, see Appendix "B". Said order indicated that the rule of law regarding checkpoint searches would not be applied to arrests made prior to this Honorable Court's decision in Almeida-Sanchez, supra.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT'S RULING THAT FIXED CHECKPOINT SEARCHES FOR ALIENS REQUIRE PROBABLE CAUSE SHOULD BE APPLIED TO PETITIONER

Petitioner contends that the Ninth Circuit's finding in Bowen, supra, Part II, that Almeida-Sanchez, supra, created a "new rule" is incorrect. Petitioner herein incorporates by reference the dissenting opinion and citations of Circuit Judge Hufstedler in Bowen, Part II. In addition, Petitioner contends that even the majority opinion in Bowen, Part II, as enunciated by Circuit Judge Wallace, really describes how Almeida-Sanchez, supra, will result in new procedures at Border Patrol Checkpoints rather than a new rule of law. The new procedures will be due to the United States Supreme Court's insistence that existing law be followed rather than the creation of new law.

The United States Supreme Court has always held unconstitutional searches without probable cause, a warrant or consent.

See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971), Chambers v. Moroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949), Husty v. United States, 282 U.S. 694, 51 S.Ct. 240 (1931) and Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925). Obviously, fundamental constitutional protections cannot be changed by statute, regulation or lower court decisions.

Failure to acknowledge and correct a situation where a defendant has been deprived of a basic constitutional right would result in much more misunderstanding and disrespect for our laws than the potential benefits to those convicted after unconstitutional searches.

Petitioner raised the issue of the constitutionality of the search at the earliest opportunity and filed a timely appeal. His arrest was substantially after the arrest of Almeida-Sanchez whose trial took place in 1970. Certainly, the law applicable to the earlier case should apply to Petitioner. The Fifth and Tenth Circuits seem to agree. See United States v. Byrd, 483 F.2d 1196

(5th Cir. 1973) and United States v. King, 485 F.2d 353 (10th Cir. 1973).

CONCLUSION

Since the search in Petitioner's case was without probable cause, warrant or consent, it is respectfully requested that the law in United States v. Bowen, supra, be applied to Petitioner.

Respectfully submitted,

HOWARD GERSHAN

Attorney for Petitioner